No. 15442.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant,

vs.

VERDA A. GOREY,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

OVILA N. NORMANDIN, and
JOHN C. MORROW,
210 West Seventh Street,
Los Angeles 14, California,
Attorneys for Appellant, The National Life and Accident Insurance Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Statement of Pleadings and Facts Showing Basis of Jurisdiction of the United States District Court and of the United States Court of Appeals.

The complaint in this action was originally filed by the plaintiff-appellee in the Superior Court of the State of California, in and for the County of Los Angeles on March 5, 1956. The complaint was for recovery of the proceeds alleged to be payable to plaintiff, as beneficiary, on an insurance policy issued by the defendant-appellant on the life of George E. Gorey, viz. the sum of $9,363.00 with interest [R. 3-5]. On March 16, 1956, the defendant-appellant filed a petition for removal of the action to the United States District Court for the Southern District of

California, Central Division, under Title 28, U. S. C. A., Sections 1441, 1446, 1332, on the ground of diversity of citizenship. The action was thereupon removed to the United States District Court and an answer to the complaint was filed by the defendant-appellant [R. 5-11]. The case was tried in the District Court before a jury, the Honorable William C. Mathes, Judge presiding, and judgment for the plaintiff-appellee on the verdict, in the sum of $9,431.00, was entered on November 20, 1956 [R. 23]. On November 21, 1956, the defendant-appellant filed its written motion to set aside the verdict and for judgment or for a new trial, in the alternative, under Federal Rules of Civil Procedure, Rules 50(b) and 59 [R. 24-27]. Said motions were heard on December 3, 1956, and were denied, the order denying said motions being entered December 21, 1956 [R. 28]. A notice of appeal to the United States Court of Appeals for the Ninth Circuit from said judgment and from said order denying said motions was filed by the defendant-appellant on January 8, 1957 [R. 29]. The Circuit Court of Appeals has jurisdiction of this appeal from the final decision of the District Court (28 U. S. C. A., Sec. 1291).

Statement of Case and Questions Involved.

This is an action by the beneficiary on a life insurance policy issued by appellant on or about May 1, 1954. The defense was and is: (1) that the insured, George E. Gorey, in his written application for the insurance policy dated April 14, 1954, made material false representations to appellant by making false answers to specific questions in the application, to wit, that he had never had an ailment or disease of the heart, and that he had never consulted any physician, and (2) that the insured, by said false answers in the application and by his failure to advise

appellant of such false statements thereafter, concealed said material facts from appellant, and (3) that before issuance of the policy the insured falsely represented to appellant's medical examiner that he had never undergone an electrocardiogram and concealed from him that he had, and (4) that the insured was not in good health at the time of his application for insurance or delivery of the policy, and (5) that appellant relied upon the application and the insured's answers to said questions therein and upon the medical examiner's report in issuing and delivering the policy to the insured, and is not liable on the policy.

Appellant contends that the evidence is uncontradicted that the insured consulted a physician in October, 1953, less than six months before applying for the insurance policy; that the physician examined the insured on several occasions, took an electrocardiogram of insured, diagnosed his condition as coronary arteriosclerosis, advised the insured that he had a heart disease, and that the insured died in November, 1955, of coronary arteriosclerosis; that appellant relied upon the written application and the insured's answers to the questions therein and upon the medical examiner's report in issuing the policy, and therefore that appellant's motions for a directed verdict and for judgment under F. R. C. P., Rule 50(b), should have been granted.

Appellant further contends that the trial court committed prejudicial error in giving certain jury instructions and in refusing to give certain jury instructions requested by appellant.

The questions involved in this appeal are:

(1) Was appellant entitled to a directed verdict and to an order setting aside the verdict and for judgment under F. R. C. P., Rule 50(b)?

(2) If appellant was not entitled to a directed verdict and to judgment under F. R. C. P., Rule 50(b), did the trial court commit prejudicial error in giving certain jury instructions or in refusing to give certain jury instructions requested by appellant?

Specification of Errors Relied Upon.

Point I.

The Trial Court Erred in Denying Appellant's Motion for a Directed Verdict and for an Order Setting Aside the Verdict and for Judgment Under F. R. C. P., Rule 50(b). The Evidence Establishing Appellant's Defenses of Misrepresentation and Concealment Was Uncontradicted.

Point II.

The Trial Court Committed Prejudicial and Reversible Error in Giving the Following Jury Instructions and in Refusing to Give the Following Jury Instructions Requested by Appellant.

(1) The trial court erred in giving the following jury instructions [R. 127-128]:

> "Answers to questions in an application for insurance are generally deemed material representations of fact, which, if false, may vitiate the policy.
>
> "If an insurance company is misled by misstatements or concealments of an insured person into issuing a policy it would not otherwise have issued, the company is not liable on the policy, regardless of

whether the failure of the insured person to state the true facts as known and understood by him was intentional or unintentional.

The representations of George E. Gorey in his application for insurance in question here were material, if they were such as to mislead the defendant into issuing a policy which the defendant would not otherwise have issued."

The grounds of the objections urged were: (a) that the misrepresentations and concealments were material as a matter of law [R. 135-136], (b) that material misrepresentations or concealments "will" vitiate the policy rather than "may" [R. 136], (c) that inclusion of the clause "and understood by" the insured presented a question not in issue [R. 135].

(2) The trial court erred in giving the following instructions [R. 126, 128]:

"To establish the defense of avoiding that policy of life insurance on the ground of misstatement or concealment by George E. Gorey of material facts, the burden is upon the defendant to prove by a preponderance of the evidence that some material misstatement was made by George E. Gorey, or that said George E. Gorey concealed some material facts from the defendant, and that the defendant would never have issued the policy but for such concealment or misstatement.

If you find from a preponderance of the evidence that George E. Gorey had knowledge of such facts but concealed them from the defendant, as the defendant alleges, and further find that the defendant would never have issued the policy if the defendant had known and understood whatever George E. Gorey may have known and understood with respect to such

matters at the time of the issuance of the policy, then your verdict should be in favor of the defendant."

The grounds of the objections urged were: (a) that the inclusion of the clause "would never have issued the policy" was error as being contrary to law, (b) the clause "may have known and understood" was contrary to law [R. 135. 136].

(3) The trial court erred in giving the following jury instruction [R. 129; portion objected to quoted]:

> "* * * and you further find that * * * the defendant would never have issued the policy if the defendant had known and understood whatever George E. Gorey may then have known and understood with respect to the state of his health, then the insurance policy did not become effective upon delivery. * * *"

The ground of the objection urged was that said portion of the instruction was an incorrect statement of the law applicable [R. 137].

(4) The trial court erred in giving the following jury instruction [R. 124]:

> "* * * You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserved; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound."

The grounds of the objections urged were that there was no expert opinion received in evidence and that the effect of said instruction was to confuse the jury with respect to its right to reject or disregard the testimony of Dr. Kerchner who gave no expert opinion testimony [R. 134-135].

(5) The trial court erred in refusing to give the following jury instruction (No. 3) requested by appellant [R. 17]:

> "You are instructed that if George E. Gorey was treated by a physician before the date of the making of the application for the policy of insurance involved in this case, that is, before April 14, 1954, that fact is presumed to have been within the personal knowledge of George E. Gorey, and if his representations in his application with regard to having ever consulted a physician for any ailment or disease of the heart are false, he was guilty of fraud, although as a matter of fact, he might not have intended to deceive the company, and your verdict should be for the defendant company."

The ground of objection urged was that the requested instruction was a proper statement of the law applicable to evidence received, authority being cited in the requested instruction [R. 137-138].

(6) The trial court erred in refusing to give the following jury instruction (No. 5) requested by appellant [R. 18]:

> "You are instructed that if George E. Gorey, the applicant, concealed the fact that he had consulted a physician concerning which enquiry was made by the defendant company in the application for insurance, it is not necessary that the matter concealed effect the length of the insured's life. If you find that there was a concealment by reason of the failure of George E. Gorey to disclose his consultations with a physician or physicians, your verdict must be for the defendant company even though you believe that the ailment or disease for which the consultation or consultations was had did not shorten the life of George E. Gorey."

The ground of objection urged was that the requested instruction was a proper statement of the law applicable to evidence received, authority being cited in the requested instruction [R. 137-138].

(7) The trial court erred in refusing to give the following jury instruction (No. 8) requested by appellant [R. 18]:

> "If George E. Gorey concealed any material fact or facts with regard to his medical history, the plaintiff cannot recover in this action and this is true, although you may find that the facts concealed had no connection with the cause of George E. Gorey's death."

The ground of objection urged was that the requested instruction was a proper statement of the law applicable to evidence received, authority being cited in the requested instruction [R. 137-138].

(8) The trial court erred in refusing to give the following jury instruction (No. 9) requested by appellant [R. 19]:

> "You are instructed that the requirement of fair dealing is laid on both parties to the insurance policy involved in this action. This requirement imposed a duty on the part of George E. Gorey, the insured, to read the insurance policy and the photostatic copy of his application attached thereto upon the delivery thereof to him by the defendant company, and you may assume that he did so and that he had full knowledge of the questions contained in said application and his answers thereto. He also had a duty to report to the defendant company any misrepre-

sentations set forth in or omissions in his application within a reasonable time. If you find that he neglected to so inform the defendant company of any such material misrepresentation or omission, your verdict should be for the defendant company."

The ground of objection urged was that the requested instruction was a proper statement of the law applicable to evidence received, authority being cited in the requested instruction [R. 137-138].

(9) The trial court erred in refusing to give the following jury instruction (No. 10) requested by appellant [R. 19-20]:

"You are instructed that the fact that George E. Gorey was examined by one of the defendant company's medical examiners at or about the time of his application for insurance in no way affects the right of the defendant company to deny liability under the policy of insurance involved in this action if a full and truthful disclosure of facts concerning which the defendant company made enquiry was not made by George E. Gorey in his application for insurance."

The ground of objection urged was that the requested instruction was a proper statement of the law applicable to evidence received, authority being cited in the requested jury instruction [R. 137-138].

(10) The trial court erred in refusing to give the following jury instruction (No. 11) requested by appellant [R. 20]:

"You are instructed that the policy of insurance involved in this action was delivered to George E.

> Gorey in May, 1954, and at the time of delivery a photostatic copy of the application therefor was attached thereto; that the policy and the application therefor constituted the entire contract between the defendant company and George E. Gorey. George E. Gorey, over his own signature, declared that each of the statements contained in said application were full, complete, true and without exception, unless such exception was noted. The statements contained in the application thereby became his solemn representations and of the same binding force upon him as though he had himself written them out in his own handwriting and signed them."

The ground of objection urged was that the requested instruction was a proper statement of the law applicable to evidence received, authority being cited in the requested instruction [R. 137-138].

(11) The trial court erred in refusing to give the following jury instruction (No. 12) requested by appellant [R. 21]:

> "You are instructed that if you find that George E. Gorey, in October, 1953, supposing himself to be in need of a physician, did consult a physician and answered such enquiries as the physician deemed pertinent and received aid, advice or treatment which the physician deemed necessary, he had consulted a physician within the meaning of the question asked relative thereto in his application for the insurance policy."

The ground of objection urged was that the requested instruction was a proper statement of the law applicable to evidence received, authority being cited in the requested instruction [R. 137-138].

(12) The trial court erred in refusing to give the following jury instruction (13) requested by appellant [R. 21-22]:

> "The defendant company was entitled to have a full, complete and true statement by George E. Gorey of the names and addresses of physicians he had ever consulted before he applied for the policy of insurance involved in this action insofar as the defendant company made enquiries of George E. Gorey relative thereto at the time he made said application. The written application for the insurance policy involved in this action made by George E. Gorey to the defendant company on or about April 14, 1954 includes the question to George E. Gorey, the applicant: 'State names and addresses of physicians you have ever consulted and give the occasion by reference to question numbers and letters above.' If you find that George E. Gorey answered this question in said application by stating that he had never consulted any physicians, and if you further find that before making such application George E. Gorey had consulted a physician, namely, R. R. Kerchner, M. D., your verdict must be for the defendant company."

The ground of objection urged was that the requested instruction was a proper statement of the law applicable to evidence received, authority being cited in the requested instruction [R. 137-138].

ARGUMENT.

POINT I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT AND FOR AN ORDER SETTING ASIDE THE VERDICT AND FOR JUDGMENT UNDER F. R. C. P., RULE 50(b). THE EVIDENCE ESTABLISHING APPELLANT'S DEFENSES OF MISREPRESENTATION AND CONCEALMENT WAS UNCONTRADICTED.

1. Summary of Applicable Law on Misrepresentation and Concealment.

Before proceeding with argument under Point I, appellant presents the following summary of the law applicable to its defense.

California Insurance Code, Sections 330 to 361 (based on former Cal. Civ. Code, Secs, 2561-2582), sets forth the basic rules applicable to concealment and misrepresentation by an applicant for life insurance. Several of the more important Insurance Code sections applicable to this case are:

> "Section 330. Definition. Neglect to communicate that which a party knows, and ought to communicate, is concealment."
>
> "Section 331. Effect. Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."
>
> "Section 332. Required Disclosures. Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining."

"Section 334. Determination Of Materiality Of Fact Concealed. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

"Section 358. Falsity: What Constitutes. A representation is false when the facts fail to correspond with its assertions or stipulations."

"Section 359. Same: Effect. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false."

"Section 360. Materiality. The materiality of a representation is determined by the same rule as the materiality of a concealment."

The California law on the subject of concealment and misrepresentation as applied to life insurance is well settled by numerous decisions of the California courts, a summary of which follows. In addition to the cases cited herein as authority, there are a number of other cases in accordance therewith.

A false answer by an applicant for insurance to a *specific* question in a written application as to whether the applicant has ever had a specific ailment or disease constitutes a material misrepresentation and a concealment of a material fact if the applicant had knowledge of such ailment or disease at the time he gave the false answer in the application. Such a misrepresentation and concealment avoids a policy issued in reliance on the application.

A false answer by an applicant for life insurance in a written application for insurance to a *specific* question in the application as to whether the applicant had ever consulted a physician constitutes both a material misrepresentation and a concealment and avoids a policy issued in reliance on the application.

San Francisco Lathing Co. v. Penn Mutual Life Ins. Co., 144 A. C. A. 185, 300 P. 2d 715;

Robinson v. Occidental Life Ins. Co., 131 Cal. App. 2d 581, 281 P. 2d 39;

California-Western States Life Ins. Co. v. Feinstein, 15 Cal. 2d 413, 101 P. 2d 696;

131 A. L. R. 608, Ann., pp. 617-655.

While a false representation or concealment by an applicant in a written application in answer to a *general* question as to whether the insured had ever had *any* ailment or disease must relate to something more than a minor or temporary ailment or disease, viz., to a substantial or appreciable disorder, to be material and avoid the policy, a false answer to a specific question as to the applicant's medical history is material *as a matter of law* and avoids the policy. Where the evidence establishes the defendant as a matter of law it is the duty of the trial court to direct a verdict for the insurer.

Maggini v. West Coast Life Ins. Co., 136 Cal. App. 472, 29 P. 2d 63;

California-Western States Life Ins. Co. v. Feinstein, supra, 15 Cal. 2d 413, 101 P. 2d 696;

Whitney v. West Coast Life Ins. Co., 177 Cal. 74, 169 Pac. 997;

Pierre v. Metropolitan Life Ins. Co., 22 Cal. App. 2d 346, 70 P. 2d 985;

McEwen v. New York Life Ins. Co., 187 Cal. 144, 201 Pac. 577.

While it is incumbent on an insurer to prove that the insured had knowledge of the particular ailment or disease relied on as the fact misrepresented or concealed by the applicant in order to avoid the policy, it is presumed as a matter of law that an applicant had knowledge of a prior consultation by him with a physician, at least where the consultation was relatively recent.

Whitney v. West Coast Life Ins. Co. (*supra*), 177 Cal. 74, 169 Pac. 997.

2. The Evidence Proving Appellant's Defenses Is Uncontradicted.

(a) The Evidence Is Uncontradicted That George E. Gorey, the Insured, Represented in Writing to Appellant in His Written Application for the Policy That He Had Never Had an Ailment or Disease of the Heart and That He Had Never Consulted Any Physician.

It is an admitted fact that the insured, on or about April 14, 1954, made, executed and delivered to appellant at Whittier, California, his written application [Ex. A] for the policy [Ex. 1; R. 12, 34], and that a true copy of the application was attached to and made a part of the policy at the time of the issuance and delivery of the policy to the insured [R. 13, 35]. The original policy in evidence has a photostatic copy of the application attached thereto [Exs. A, 1]. It is also an admitted fact [R. 14, 36], and the application shows on its face among other things, that the application stated, among other things, the following specific questions to be answered by the applicant and contains the following specific answers to said questions, to wit: "Question 54. Have you ever had any ailment or disease of: B. Heart or lungs? Yes or No. No." "Question 60. State names

and addresses of physicians you have ever consulted and give the occasion by reference to question number and letters above. NONE."

The original application [Ex. A] shows at the bottom the signature in handwriting of the insured (applicant) "George E. Gorey." The photostatic copy of the original application attached to the original policy when issued [Ex. 1], received in evidence on appellee's offer, likewise shows said signature and there was no question raised and it is undisputed that the handwritten signature was that of the insured. Directly above insured's signature on the application appears the following statement (in part) "62. On my own behalf and in behalf of any person who may have or claim any interest in any policy issued hereon: (1) I hereby declare that each of the statements contained herein is full, complete, true, and without exception, unless such exception is noted. (2) I hereby agree that except as provided in the receipt referred to in Item 63, the proposed contract shall not be effective until the policy has been issued, the first premium actually paid and accepted by the Company, and the policy delivered to and accepted by me during the lifetime and good health of the person or persons upon whose death a policy benefit matures. (3) I hereby agree that no statement has been made or information given in connection with this application which is, in any way, inconsistent with anything appearing herein or in the above mentioned receipt."

Paragraph 23 of the policy [Ex. 1] provides that the policy and copy of the application attached thereto constitute the entire contract.

(b) The Evidence Is Uncontradicted That Said Representations by the Insured That He Had Never Had an Ailment or Disease of the Heart and That He Had Never Consulted Any Physician Were False and That the Insured Had Knowledge Thereof at the Time of His Application for the Policy.

The testimony of Dr. R. R. Kerchner, Sr., shows without contradiction the following: that George E. Gorey, the insured, consulted Dr. R. R. Kerchner, Sr., professionally at the doctor's office in Montebello, California, on three different occasions in October, 1953, viz., October 21st, 27th and 31st [R. 48-49]; that the insured had known the doctor for some ten years previously [R. 47-48]; that Dr. Kerchner was in October, 1953 and is a licensed physician [R. 46-47]; that the insured on October 21, 1953, at his first consultation with Dr. Kerchner, complained of pain in his chest and numbness particularly in his left arm upon heavy work that produced excessive exertion [R. 48-49]; that he gave Dr. Kerchner a history of having had such complaints for a month to six weeks before October 21, 1953 [R. 49]; that Dr. Kerchner obtained the insured's medical history for the purpose of diagnosing and treating said complaints [R. 50]; that Dr. Kerchner on October 21, 1953 made a complete general physical examination of the insured from head to foot, including his heart, made a stethoscopic examination [R. 51]; that Dr. Kerchner took an electrocardiogram [Ex. D] and chest X-rays of the insured on October 27, 1953 [R. 51]; that Dr. Kerchner made a tentative diagnosis of coronary insufficiency, coronary artery disease, after taking the electrocardiogram and chest X-rays and sent the electrocardiogram to Dr. Travis Windsor, M.D., a specialist in electrocardiography, cardiac disease and

heart, for his opinion [R. 52-53]; that Dr. Kerchner received a written report [Ex. E] from Dr. Windsor before October 31, 1953, in which report stated that his interpretation of the electrocardiogram tracing was "very strongly suggestive of coronary insufficiency" [R. 54]; that upon receiving Dr. Windsor's report Dr. Kerchner made a final diagnosis of the insured's condition as "coronary heart disease," "coronary artery disease," the technical name for which is "coronary arteriosclerosis" meaning "hardening of the coronary arteries" [R. 55-56]; that the electrocardiogram confirmed his tentative diagnoses that the insured was suffering from said condition and disease [R. 56]; that Dr. Kerchner, in October, 1953, explained his said diagnosis of the insured's condition to the insured and explained to him he had that trouble and prescribed for him lighter work, less forceful exercise, discontinuing smoking and overeating—any thing that might produce increased heart rate which would likely bring on the pain which he experienced and which would cause him perhaps trouble [R. 55]; that Dr. Kerchner also gave the insured a prescription for nitroglycerin tablets to take for the pain and advised him to come in for another electrocardiogram in six months "or before if his condition became more severe" [R. 56-57]; that the insured did not consult Dr. Kerchner regarding his coronary arteriosclerosis condition after October 31, 1953, although in March and April, 1954 he treated the insured on three or four occasions for a sprained knee and hemorrhage of the knee, the last such visit being April 7, 1954 [R. 57] (which was one week before the date of the application for insurance [Ex. A]); that the last time the insured consulted him professionally was August 15, 1954, for a headache [R. 57]. On cross-

examination Dr. Kerchner testified: "Q. And when you advised Mr. Gorey as to his physical condition, especially concerning his heart, did you tell him in lay terms or did you tell him in medical terms what was wrong with him? A. I told him in lay terms. I am certain of that" [R. 59]; that the insured's condition in October, 1953 . . . "might have been very severe at that time. It might not have been, because the record only showed that he had this trouble after he exercised. If he hadn't exercised, we wouldn't know he had it at all" [R. 60]; (referring to the electrocardiogram) "If he didn't have coronary artery disease, he would not have developed the findings, the segment shifts on exercise. I will have to say that was a positive finding. I don't think there is any question" [R. 61].

The above statement of Dr. Kerchner's evidence is, we believe, a fair summary of all of the evidence concerning the insured's physical condition and his knowledge thereof prior to the time he made the written application for the policy. While the appellee testified that the only illness the insured complained of to her before his death was "pains in his chest—about two or three months before," that she didn't know if he took any nitroglycerin tablets before his death, and that she was first aware that he might have had heart trouble was at his death [R. 104-105], such testimony merely goes to *her* knowledge of his condition. Such testimony of appellee does not in any way contradict Dr. Kerchner's clear testimony that the insured had a heart disease for about five and one-half months before he applied for the insurance that the insured knew of his heart disease, and that he thereafter represented to appellant that he had never had any ail-

ment or disease of the heart and had not consulted any physicians.

The only other evidence on the subject of the insured's physical condition is Exhibit 2, introduced in evidence by appellee, and Exhibits B and C. Exhibit 2 is a certified copy of the insured's death certificate signed by Dr. Kerchner, showing he died November 21, 1955, and stating the disease or condition directly leading to death, as "acute myocardial infarction" and the antecedent disease due to "coronary arteriosclerosis". Dr. Kerchner testified that "acute myocardial infarction" is "death of a portion of the heart muscle" [R. 58]. Exhibits B and C are the notice of claim signed by the appellee, and the attending physician's statement signed by Dr. Kerchner, Jr., both exhibits having been delivered to appellant by appellee shortly after the insured's death. Exhibit B dated November 21, 1955, states the insured's cause of death as "heart attack" and Exhibit C states that the insured's immediate cause of death was "myocardial infarction", the contributory causes of death as "coronary arteriosclerosis", that Dr. Kerchner, Sr. was the insured's medical advisor for 25 months, that the doctor was first consulted on October 21, 1953 for the condition which directly or indirectly caused his death, that Dr. Kerchner, Jr. attended the insured in his final illness, that in his opinion the insured suffered from the disease or impairment for 25 months before his death, and that the duration of the insured's coronary arteriosclerosis was 25 months.

Furthermore, appellee stipulated it to be an unadmitted fact not to be contested, that the disease or condition directly leading to the insured's death was acute myocardial infarction, and the antecedent cause to be coronary arteriosclerosis [R. 16].

(c) The Evidence Is Uncontradicted That the Insured Misrepresented to and Concealed From the Insurer's Medical Examiner and From the Insurer the Fact That He Had Undergone an Electrocardiogram.

Exhibit A-1, the appellant's form of medical examiner's report, signed by the insured and Sutten H. Groff, M.D., dated April 20, 1954, and being part VII of the application, shows that Dr. Groff, appellant's medical examiner, examined the insured on that date for the life insurance, that he found nothing wrong with the insured, that he verified the insured's answers to Part IV of the application (which includes the insured's misrepresentations that he had never had any heart disease and had never consulted any physicians). Exhibit A-1, said medical examiner's report, which bears the insured's signature, also includes the question and answer:

> "F. Has Proposed Insured ever undergone an electrocardiogram? No."

In the summary of the evidence under the previous Point (b) it is pointed out that the evidence shows that Dr. Kerchner took an electrocardiogram of the insured's heart on October 27, 1953, he having requested the insured on October 21, 1953 to come in for that purpose, and that the doctor on October 31, 1953 advised the insured "to come in in six months for another repeat electrocardiogram . . ." [R. 51, 57.] The electrocardiogram taken is Exhibit D. There is no evidence to the contrary and appellee stipulated among other things, that it was an unadmitted fact, not to be contested, that in October, 1953, the insured was examined by Dr. R. R. Kerchner, M.D., that the doctor diagnosed his condition and had him undergo an electrocardiogram [R. 15-16].

(d) The Evidence Is Uncontradicted That the Insured Concealed His Medical History From the Insured, That the Insurer Relied on the Application and the Medical Examiner's Report in Issuing and Delivering the Policy, and That It Had No Knowledge of the Misrepresentations or of the Facts Concealed by the Insured.

It is an admitted fact that the insurer relied upon the application [Ex. 1], on the medical examiner's report [Ex. A-1] and on the retail credit report [Ex. F] and it is specifically admitted that the insurer relied on the answers to questions 54 and 60 (contained in the application) in issuing and delivering the policy to the insured [R. 14-15]. Answers to questions 54 and 60 stated that the insured had never had any ailment or disease of the heart and had never consulted any physician. While it would appear that it would necessarily be presumed from these stipulated facts that the insurer had no knowledge of the facts misrepresented to and concealed from it by the insured, and also that the insurer would not have issued or delivered the policy if it had any such knowledge, the record includes uncontradicted evidence establishing such facts. The testimony of Lawson W. Smith, local district manager and administrative officer of the appellant at all times pertinent to the policy involved in this action, shows that the local district office of appellant did not at any time receive any information or communication from the insured or from any one else on his behalf that any of the answers in the insured's written application [Ex. A] were not correct, and that he had received no information with respect to the insured having consulted Dr. Kerchner until after appellee presented her claim on the policy [R. 75].

The uncontradicted testimony of Jack D. Gwaltney, Senior Underwriter of appellant at its Home Office in

Nashville, Tennessee, shows: that on April 29, 1954 he approved the written application of George E. Gorey, the insured [Ex. A] for the insurance policy in suit; that his duties as underwriter were the selection of risks, viz., to review applications for ordinary life insurance to determine whether the applicant was eligible for the policy applied for; that he had authority to approve applications for policies up to $10,000, if he determined an applicant was eligible for the policy applied for; that the policy in suit was issued by appellant upon his final approval on the basis of a standard rating; that the only information he had available in passing on the application were the applicant's statements and information in the application, the information in the medical report [Ex. A-1] and the information in the inspection report [Ex. F], and that he relied only on the statements and information contained therein; that if the said statements and information had been true the applicant was eligible for the policy he applied for; that if the application had shown that the applicant had consulted a physician in October, 1953 for a pain in his chest and a numbness and tingling in his arm and hand and that the physician had diagnosed the condition as coronary artery disease, a type of heart disease, and that the physician had made an electrocardiogram of the applicant and confirmed his diagnoses, he would not have approved the application and would have marked the application indicating the applicant was not insurable and would have forwarded the application to the company's medical department; that if the appellant had known that the applicant had been diagnosed as having coronary artery disease in October, 1953 it would have made him an uninsurable risk for life insurance by the company; that no communi-

cation was received by the Home Office of the Company or by him from the insured or from any other person relating to any of the answers to the questions set forth in the application, and that if any such communication had been received it would have been referred to him; that he had searched the papers, records and files in the Home office and had ascertained that no such communication or information had been received by the Company during the insured's lifetime [R. 83-91].

The uncontradicted testimony of Dr. Lloyd C. Miller, Medical Director of the appellant at its Home Office shows: that as associate medical director of the Company in 1954 he had authority to approve or reject applications for ordinary life policies, particularly on medical questions arising in underwriting; that he did not personally see all applications for insurance and if the underwriter approved an application for issuance of a policy he (the medical director) would not see it unless there was a question whether the applicant was eligible for the policy applied for; that he had not participated in the underwriting of Mr. Gorey's application since it had been approved by Mr. Gwaltney as underwriter; that if Mr. Gorey's application had been referred to him and it had revealed that Mr. Gorey in October, 1953, had consulted a physician for a pain in his chest and a numbness and tingling of the arm and hand and that the physician had diagnosed the condition as coronary artery disease after an electrocardiogram had been taken, the application would have been rejected and declined; that a diagnosis of coronary artery disease within one year prior to the date of the application would mean a material and substantial additional risk for a life insurance company in issuing a policy on that applicant; that such a disease

increases the risk of a premature death to such an extent that the applicant is an uninsurable risk [R. 93-94, 102-103].

The uncontradicted testimony of Eldon Stevenson, Jr., President of the appellant company, corroborates Mr. Gwaltney's testimony herein referred to showing that appellant had no knowledge of the insured's concealed medical history, viz., that the appellant's records do not indicate that any agent or employee of the appellant ever knew or had any reason to believe, before Mr. Gorey's death, that Mr. Gorey had ever consulted any doctor or had been ill or had any disease of any kind; that on April 30, 1954 (date of the policy) the only records, information and reports covering Mr. Gorey were his application [Ex. A] the medical examiner's report [Ex. A-1] and the credit report [Ex. F]; and that on April 30, 1954 the appellant had no information in its possession concerning any illness or disease or medical treatment or advice of Mr. Gorey excepting the information set forth in the application, medical report and credit report that Mr. Gorey had never had any illness or disease and had never received any medical treatment or advice and had not undergone an electrocardiogram [R. 98-99].

(e) The Evidence Is Without Conflict That the Insured Was Not in Good Health When the Policy Was Delivered to and Accepted by the Insured.

Part VI, Paragraph 62(2) of the application provides, in part, an agreement by the insured that "the proposed contract shall not be effective until the policy has been issued, . . . and the policy delivered to and accepted by me during the lifetime and good health of the person or persons upon whose death a policy benefit matures."

As pointed out under paragraph (b) above the evidence shows, without conflict, that the insured was not in "good health" when the policy was delivered to and accepted by him on or about May 1, 1954. The evidence shows that the insured had been diagnosed by Dr. Kerchner in October, 1953, as having "coronary heart disease", "coronary artery disease", "coronary arteriosclerosis" [R. 55-56]. It is established that the heart disease continued from October, 1953 to the date of the insured's death on November 21, 1955 by the insured's death certificate [Ex. 2] showing the antecedent cause of death as "coronary arteriosclerosis", and by the attending physician's statement [Ex. C] showing the contributory cause of death as "coronary arteriosclerosis" and that the insured had suffered from the disease (coronary arteriosclerosis) for 25 months before his death, viz, since October, 1953. This evidence is not contradicted. Therefore, the policy did not become effective under the agreement in the application.

3. **Appellant's Motions for a Directed Verdict and for Judgment Under Rule 50(b) Should Have Been Granted. The Judgment and Order Denying the Motions Should Be Reversed and Judgment for Appellant Directed.**

The rule applicable to a determination of this question, as this court stated in *Nichols v. United States* (C. C. A. 9th), 68 F. 2d 597, page 600, is:

> "The rule in the federal courts is that there must be more than a scintilla of evidence to entitle a case to go to a jury. U. S. v. Lyle et al. (C. C. A.) 54 F. 2d 357, 358. A case cannot be submitted to a jury upon speculation or mere probabilities. U. S. v. Crume (C. C. A.) 54 F. 2d 556, 558."

Appellant believes that it has fully and fairly summarized the evidence in this case. Not only is there not sufficient evidence within the "scintilla" rule but there is *no* evidence in the record contradicting the evidence establishing the appellant's defenses of misrepresentation and concealment, and that the insured was not in good health when the policy was delivered. Not only the facts but all inferences reasonably to be drawn therefrom as, supported by the overwhelming weight of the evidence, point so strongly in favor of the appellant that reasonable men could not possibly come to a conclusion to the contrary.

Reference is made to the following cases holding a directed verdict to be proper in cases similar on the facts to the case at bar. In *Whitney v. West Coast Life Ins. Co.*, 177 Cal. 74, 169 Pac. 997, the application for life insurance included specific questions as to whether the applicant had ever had a disease of the heart, to which he answered "No", and if he had been attended by a physician, to which he answered "Dr. Chichester" for a burn of arm and chest. The insured died of acute myocarditis, a heart disease. The evidence showed that he had consulted another doctor (not named) for shortness of breath which doctor had diagnosed his condition as myocarditis and had told the insured of his diagnosis, using the word "myocarditis". The appeal was from the judgment for the plaintiff and the order denying a new trial (not from a motion for judgment *n.o.v.*). At page 81 of the opinion the California Supreme Court stated, in reversing the judgment and order:

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> "Of course, we cannot tell what new evidence may be forthcoming if the cause be retried, but unless some very positive proof available to overcome the

necessary deductions arising from the conduct of the assured, it would be the duty of the trial court to decline to submit the question of fact to a jury."

In *Maggini v. West Coast Life Ins. Co.*, 136 Cal. App. 472, 29 P. 2d 63, the application for insurance specifically inquired if the applicant had ever raised or spat blood and if he had ever consulted a physician for or had symtoms of lung disease. He answered "no". The evidence showed the insured had consulted a physician for pneumonia in both lungs and that he had spat blood. After holding the misrepresentations to be material as a matter of law, the appellate court reversed judgment on a verdict for the plaintiff and the order denying a motion for judgment *n.o.v.* and directed judgment for the defendant insurer on the ground that there was "no evidence direct or inferential which supports the verdict" and that the motion for judgment *n.o.v.* should have been granted.

In *Pierre v. Metropolitan Life Ins. Co.*, 22 Cal. App. 2d 346, 70 P. 2d 985, the applicant falsely answered specific questions as to whether he had ever had paralysis and what physicians he had consulted. Holding that uncontradicted evidence of false answers to the specific questions showed a misrepresentation and concealment of material facts as a matter of law, which avoided the policy, the court reversed the judgment on a verdict for the plaintiff and the order denying a motion *n.o.v.*

In *McEwen v. N. Y. Life Ins. Co.*, 187 Cal. 144, 201 Pac. 577, the application inquired as to what illnesses, diseases or accidents the applicant had had. He answered

typhoid pneumonia. The evidence showed that he had an accident in which his chest was injured. The court affirmed the trial court's judgment for the defendant-insurer on a directed verdict, stating that the evidence conclusively showed that the question as to prior accidents had been falsely answered.

In *Palmquist v. Standard Acc. Ins. Co.,* 3 Fed. Supp. 356 (D. C. Cal.), the application included a question as to whether the applicant had ever had a gastric ulcer, which he answered in the negative. On uncontradicted evidence that the answer was false, the court held that the false representation was material as a matter of law, and granted the insurer's motion for a directed verdict.

In *Enelow v. New York Life Insurance Co.,* 83 F. 2d 550 (C. C. A. 3rd) (cert. den. U. S. Sup. Ct. 298 U. S. 680) the appellant falsely answered in the negative a question as to whether he had ever consulted a physician for or suffered from any ailment or disease of the heart, blood vessels or lungs. The uncontradicted evidence showed that he had consulted several doctors, their diagnosis having been "coronary disease" after they took X-rays of the heart and an electrocardiogram. One doctor had told the applicant "he had a weakness of the heart". The insured died from the heart disease. The court affirmed the judgment on directed verdict for the insurer.

In concluding the argument under Point I, reference is made to *Robinson v. Occidental Life Ins. Co.,* 131 Cal. App. 2d 581, 281 P. 2d 39. Although it is not a jury case and therefore does not involve the matter of a

directed verdict, the *Robinson* case is not only very similar to this case on the facts but is one of the more recent California cases on misrepresentation and concealment. There, the insured falsely answered specific questions in his application for life insurance as to whether he had ever had any heart disease and as to physicians he had consulted, the evidence showing that he concealed in his application that he had vascular hypertension, a heart disease, and that he had consulted a physician therefor and had been advised of the physician's diagnosis of that condition. At page 586 the court stated, in affirming judgment for the insurer:

> "An insurance company is entitled to determine for itself what risks it will accept, and therefore to know all the facts relative to the applicant's physical condition. It has the unquestioned right to select those whom it will insure and to rely upon him who would be insured for such information as it desires as a basis for its determination to the end that a wise discrimination may be exercised in selecting its risks. (Mutual Life Ins. Co. v. Hurni Packing Co., 260 F. 641, 645 [171 C. C. A. 405].)"

In the case at bar the evidence overwhelmingly established, without any conflict or contradiction, that the insured knowingly misrepresented to and concealed from the insurer material facts relied on by the insurer in issuing the policy. Appellant was entitled to a directed verdict and to judgment under Rule 50(b).

POINT II.

THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR IN GIVING THE FOLLOWING JURY INSTRUCTIONS AND IN REFUSING TO GIVE THE FOLLOWING JURY INSTRUCTIONS REQUESTED BY APPELLANT.

(1) The Trial Court Erred in Giving the Jury Instruction Specified Under Specification of Errors, Specification No. (1), Point II.

Said instruction was erroneous and prejudicial in that: (a) the question of the materiality of the insured's answers to specific questions in his application was left to the jury to decide as a question of fact, whereas such question is a matter of law for the court; and (b) the answers involved were answers to specific questions in the written application, viz. whether the applicant had ever had an ailment or disease of the heart, and whether he had ever consulted any physician, which answers were each material as a matter of law, and the jury should have been instructed that each such answer was material; and (c) the jury was instructed that material false representations *may* vitiate the policy, whereas there is no question but that such representations do vitiate the policy; and (d) the statement "regardless of whether the failure of the insured person to state the true facts as known and understood by him" cast a burden on appellant to prove that the insured *understood* the "facts" (meaning the facts misrepresented or concealed), which presented a question not in issue and cast on the insurer a burden not imposed on an insurer by law.

The California law on this point is that the question of the materiality of an answer by an applicant for life insurance to a specific question in a written application

as to whether (a) the applicant has ever had a specified ailment or disease, or (b) has ever consulted a physician, is a question of law for the court and not a question of fact for the jury to decide. It is also the law that false answers to any such specific questions are material as a matter of law and do avoid a policy issued in reliance on any such answer in a written application, and that it is the court's duty to so instruct the jury.

McEwen v. New York Life Ins. Co., 23 Cal. App. 694 at 698, 139 Pac. 242;

McEwen v. New York Life Ins. Co., 42 Cal. App. 133, 183 Pac. 373;

California-Western States Life Ins. Co. v. Feinstein, 15 Cal. 2d 413, 101 P. 2d 696;

Maggini v. West Coast Life Ins. Co., 136 Cal. App. 472, 29 P. 2d 63;

San Francisco Lathing Co. v. Penn Mutual Life Ins. Co., 144 A. C. A. 185, 300 P. 2d 715;

Robinson v. Occidental Life Ins. Co., 131 Cal. App. 2d 531, 586, 281 P. 2d 39;

Telford v. New York Life Ins. Co., 9 Cal. 2d 103, 105, 69 P. 2d 835.

It is incumbent for an insurer who seeks to avoid a policy on the ground of a false answer or concealment of facts, to prove that the applicant for insurance had knowledge of the facts covered by the questions in the application, but an insurer has no burden to prove the insured's understanding.

The "facts" involved here were quite simple, viz., the insured's history of any ailment or disease of the heart and whether he had consulted any physician. The insured's knowledge of his doctor's diagnosis of heart

disease was sought by one question. His knowledge of his own consultation with his physician was sought by the other question. The uncontradicted evidence on the question of the insured's knowledge of his having heart disease was the testimony of Dr. Kerchner that the insured had consulted him on three occasions in October 1953 for pains in the chest and arm; that the doctor had examined and treated him for heart disease and prescribed for him; and that the doctor had advised him he had a heart disease, as pointed out herein in appellant's argument under Point I. Appellee offered no evidence showing or tending to show that the insured did not fully understand these simple questions and the facts called for by them. Said instruction was clearly erroneous and prejudicial on all points specified.

(2) The Trial Court Erred in Giving the Jury Instructions Specified Under Specification of Errors, Specification No. (2), Point II.

Such instructions submitted to the jury the question of whether the insurer would have issued the policy if it had had knowledge of the misrepresented and concealed facts at the time it issued the policy and placed on the insurer the burden of establishing, to the jury's satisfaction, that it would never have issued the policy had it known such facts. The question of whether the insurer would have issued the policy, if, indeed it is pertinent, which is doubtful, is necessarily involved in a determination of whether or not the misrepresented or concealed facts are material. (*Hawley v. Ins. Co.*, 102 Cal. 651, 654, 36 Pac. 926.) As hereinabove pointed out, the materiality of a misrepresentation or concealment in a written application, in answer to specific questions, is for the trial court to determine and not for the jury.

If such are determined to be material, the policy is thereby vitiated or avoided, and if not material, the policy is not avoided thereby. Further, as previously pointed out, the facts misrepresented to and concealed from the insurer in this case are material as a matter of law. Lastly, the question of whether or not appellant would have issued the policy had it known the true facts should not have been submitted to the jury in any event, since the parties stipulated that appellant relied on the application and these specific answers in issuing the policy [R. 36]. Reliance necessarily assumes that the insurer would not have issued the policy had it had knowledge of the matters in question.

(3) The Trial Court Erred in Giving the Jury Instruction Specified Under Specification of Errors, Specification No. (3), Point II.

This instruction includes the same erroneous language and issues requiring the jury to find that the insurer would never have issued the policy and presenting the question of the insured's understanding of the facts, which points and appellant's objections thereto have been specified above with respect to the instructions covered under specification No. (2) and will not be repeated. The instruction referred to in specification (3) was, however, applied to a different matter, viz., the issue of whether the insured was in good health when the policy was delivered to him.

(4) The Trial Court Erred in Giving the Jury Instruction Specified Under Specification of Errors, Specification No. (4), Point II.

By this instruction the jury was advised that it might reject entirely the testimony of an expert witness. The only witness who conceivably could have been referred to was Dr. R. R. Kerchner, called by appellant. A very substantial portion of appellant's defense rested on this doctor's testimony. He was not called as an expert witness and did not testify as an expert. He gave the facts respecting the insured having consulted him, the history he was given by the insured, the examination he made, his diagnosis of the insured's condition, the fact that he told the insured he had a heart disease, and the treatment he prescribed. While the doctor's diagnosis of heart disease was of course based on his opinion when the diagnosis was made, the question of whether or not his diagnosis of heart disease was or was not correct was not an issue in this case. The true issue as to the matter of heart disease, was not whether the insured actually had a heart disease when he applied for the insurance but whether he had concealed from or misrepresented to the insurer the facts concerning his medical history relating to heart disease and any consultations had with physicians, viz., that he had consulted a physician and had been advised by the physician that he had a heart disease. This distinction is clearly pointed out in the *Robinson* case, *supra* (131 Cal. App. 2d 531 at p. 585):

> ". . . In her zeal to keep the inquiry directed to the subject of her husband's heart trouble, appellant quotes both doctors, Walker and Davis, that there was no heart trouble as of August 8, 1951. Such was not the issue, but rather it was: had her husband concealed knowledge of his vascular hypertension

from the insurance companies? They had a right to know all he knew on that subject whereby they might intelligently decide whether he was an insurable risk. (Mutual Life Ins. Co. v. Hurni, supra.) It was not incumbent upon respondents to investigate Mr. Robinson's statements made to the examiner. It was his duty to divulge fully all he knew. No authority is cited and none will be found holding that an insured or his beneficiaries may escape the consequences of his deception by placing upon the insurer the burden of investigating his verified statements. (Layton v. New York Life Ins. Co., 55 Cal. App. 202, 205 [202 P. 958].)"

The effect of this instruction undoubtedly was to mislead the jurors into believing that they had a right to disregard the doctor's testimony which is not the law applicable to factual testimony.

(5) The Trial Court Erred in Refusing to Give Appellant's Requested Instruction No. 3, Specified Under Specification of Errors, Specification No. (5), Point II.

This requested instruction is a proper statement of the law regarding the legal effect of a misrepresentation or concealment as to prior consultations with physicians by an applicant for life insurance in a written application for the insurance, where the misrepresentation or concealment is accomplished by means of false answers to specific questions in the application.

Telford v. New York Life Ins. Co., 9 Cal. 2d 103, 69 P. 2d 835;

Robinson v. Occidental Life Ins. Co., 131 Cal. App. 2d 581, 281 P. 2d 39;

San Francisco Lathing Co. v. Penn Mutual Life Ins. Co., 144 A. C. A. 185, 300 P. 2d 715.

The evidence introduced by appellant, as pointed out under appellant's argument, Point I, showed that the insured consulted Dr. Kerchner on three occasions in October, 1953 and was then treated by him and advised that he had a heart disease. The written application was dated April 14, 1954. This was a vital defense and appellant was entitled to have its requested instruction No. 3 given.

(6) The Trial Court Erred in Refusing to Give Appellant's Requested Instruction No. 5, Specified Under Specification of Errors, Specification No. (6), Point II.

Appellant was entitled to an instruction that a concealment as to the insured having consulted a physician would entitle it to a verdict regardless of whether the ailment, or disease for which the consultation was had affected or did not affect the length of the insured's life. The requested instruction correctly stated the applicable law.

McEwen v. New York Life Ins. Co., 42 Cal. App. 133, at pp. 146-147, 183 Pac. 373;

California-Western States Life Ins. Co. v. Feinstein, 15 Cal. 2d 413, 101 P. 2d 696.

(7) The Trial Court Erred in Refusing to Give Appellant's Requested Instruction No. 8, Specified Under Specification of Errors, Specification No. (7), Point II.

Said instruction, while similar to requested instruction No. 5, is broader and covers concealment by the insured not only of prior consultations with physicians but also the insured's medical history as to heart disease. It states the law applicable. (See cases cited under specification (6).)

(8) The Trial Court Erred in Refusing to Give Appellant's Requested Instruction No. 9, Specified Under Specification of Errors, Specification No. (8), Point II.

Said instruction correctly states the applicable law.

Telford v. New York Life Ins. Co., 9 Cal. 2d 103, 69 P. 2d 835;

Robinson v. Occidental Life Ins. Co., 131 Cal. App. 2d 581, 281 P. 2d 39;

Layton v. New York Life Ins. Co., 55 Cal. App. 202, 202 Pac. 958.

The evidence showed that the appellant's procedure as to applications was that the soliciting agent for issuance of a policy would ask the applicant the questions set forth in the written application, the agent would then write the answers given on the form in his handwriting, request the applicant to review the questions answered, and if found correct then to sign the application [R. 76]. The evidence further showed that the appellant did not receive any information or communication from or on behalf of the insured after delivery of the policy to him that any of the answers in the application were not correct [R. 75, 90-91]. Since an insured not only has a duty under the law to answer questions in an application truthfully but has the additional and affirmative duty of advising the insurer of any misstatements in the application within a reasonable time after delivery to him of the policy with attached copy of his application, appellant was entitled to such an instruction and the failure of the court to give same or any instruction on that point was prejudicial error.

(9) The Trial Court Erred in Refusing to Give Appellant's Requested Instruction No. 10, Specified Under Specification of Errors, Specification No. (9), Point II.

Said requested instruction correctly states the applicable law.

Robinson v. Occidental Life Ins. Co., 131 Cal. App. 2d 581, 281 P. 2d 39.

Since it was an admitted fact that the insured was examined by one of appellant's medical examiners before the policy was issued [R. 36-37], this requested instruction was very important; otherwise the jury might believe that appellant had no right to rely on the written application even though the application included false answers as to the applicant's medical history.

(10) The Trial Court Erred in Refusing to Give Appellant's Requested Instruction No. 11, Specified Under Specification of Errors, Specification No. (10), Point II.

This requested instruction correctly states the applicable law.

Layton v. New York Life Ins. Co., 55 Cal. App. 202, 202 Pac. 958;

Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734, 151 Pac. 159.

Appellant was entitled to such an instruction covering the legal effect of the statements in the written application and failure to give same was prejudicial error.

(11) The Trial Court Erred in Refusing to Give Appellant's Requested Instruction No. 12, Specified Under Specification of Errors, Specification No. (11), Point II.

Said requested instruction correctly stated the law applicable.

California-Western States Life Ins. Co. v. Feinstein, 15 Cal. 2d 413, 101 P. 2d 696;

Whitney v. West Coast Life Ins. Co., 177 Cal. 74, 169 Pac. 997.

It was important and appellant was entitled to an instruction as to what constituted "consulting" a physician within the meaning of question 60 in the application the evidence showing that the insured had called upon Dr. Kerchner for professional aid, advise and treatment in October, 1953 [R. 48-49].

(12) The Trial Court Erred in Refusing to Give Appellant's Requested Instruction No. 13, Specified Under Specification of Errors, Specification No. (12), Point II.

Appellant was entitled to instruction No. 13, viz., that the jury would have the duty of returning a verdict for appellant if the jury found that the insured had falsely answered the question in the application as to what physicians he had consulted, the answer to such question being material as a matter of law as previously pointed out in the authorities cited herein.

Conclusion.

Appellant was entitled to a directed verdict and to judgment on its motion under F. R. C. P., Rule 50(b). Judgment for appellee should be reversed and entry of judgment in favor of appellant should be directed.

In any event the trial court committed prejudicial error in giving the instructions objected to and in refusing to give the specified instructions requested by appellant and judgment for appellee should be reversed.

Respectfully submitted,

OVILA N. NORMANDIN, and
JOHN C. MORROW,
By JOHN C. MORROW,
Attorneys for Appellant, The National Life and Accident Insurance Company.